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Public Access to Cable Television

The Constitution guarantees freedom of speech to promote the free exchange of ideas that is vital to a democratic society.¹ If those outside the mainstream of society are to be incorporated into a pluralistic process, this exchange of ideas must include and reflect their ideas. Mass media are the only effective vehicle for expression of opinions representing diverse perspectives on public issues, including those of individuals outside the mainstream.² A high concentration of ownership in the communications industry and a lack of public access to the media, however, have discouraged individual participation in mass media communication.³ Privately owned media operated for profit often lack incentive to broadcast the ideas of diverse groups of individuals.⁴

With the advent of cable television, offering multichannel capacity controlled by one cable operator, the Federal Communications Commission (FCC) perceived a means of allowing individuals to participate in public debate without substantial infringement of rights of private owners of the media.⁵ The FCC promulgated regulations requiring cable operators to leave a small percentage of their available channels open for nondiscriminatory public access without any editorial control by the operator, thus ensuring a degree of freedom of expression.⁶

In 1979, in *FCC v. Midwest Video Corp. (Midwest II)*,⁷ the Supreme Court decided that the FCC had exceeded its authority by promulgating these regulations.⁸ The Court held that the FCC's rules were not "reasonably ancillary" to the Commission's effective regulation of television broadcasting,⁹ and were thus beyond the statutory

1. U.S. CONST. amend. I; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 371, 390 (1969).

2. Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659, 705 (1975).

3. See note 144 *infra*.

4. This result occurs although private ownership and a free exchange of ideas do not inherently conflict. See notes 205-12 & accompanying text *infra*.

5. 59 F.C.C.2d 294, 296 (1976); 36 F.C.C.2d 143 (1972); Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659, 693 (1975).

6. The current regulations are at 47 C.F.R. §§ 76.252-.256 (1980).

7. 440 U.S. 689 (1979).

8. *Id.* at 708. The regulations at issue were 47 C.F.R. §§ 76.252, .254, and .256 (1980). The regulations were formally rescinded by the FCC in 1980. 83 F.C.C.2d 147 (1980).

9. 440 U.S. at 708 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)). The majority opinion was written by Justice White, joined by Chief Justice Burger and Justices Stewart, Blackmun, Powell, and Rehnquist. Justice Stevens wrote a dissenting opinion, joined by Justices Brennan and Marshall.

authority granted to the FCC by the Federal Communications Act of 1934.¹⁰

This Comment discusses the effect of *Midwest II* on the first amendment protection of free speech. First, the Comment examines the technology of cable systems and the history of its regulation. The Comment then criticizes the Supreme Court's holding in *Midwest II*, and contends that cable systems should not be analyzed under the same criteria used to analyze the regulation of traditional broadcasting. Finally, the Comment argues that public access to cable systems should be constitutionally protected and affirmatively promoted.

Development of Cable Television

Cable television, also called Community Antenna Television (CATV), was developed in the late 1940's for use in communities unable to receive broadcast television signals because of rough terrain or a too-distant location from television stations.¹¹ Cable's capacity for improving reception soon led to its introduction into cities. CATV systems deliver television signals by wire from a central transmission point directly to the viewer's television.¹² Unlike conventional television or radio, at no point in the system are signals sent over the airwaves. The signals are sent through cables or wires much like telephone transmission.¹³

Cable technology has expanded so that cable systems are now ubiquitous and offer up to fifty-four channels.¹⁴ Recent bids have of-

10. Communications Act of 1934, ch. 652, tit. I, § 1, 48 Stat. 1064, 1064-1115 (codified at 47 U.S.C. §§ 151-155 (1976)).

11. Media Policy Session, Federal Trade Commission, Technology and Legal Change 17 (1979) [hereinafter cited as Media Policy Session].

12. There are three basic sources for the signals: (1) local broadcasting station signals received directly by a cable system antenna and transmitted along the cable, (2) local broadcasting station signals received by an antenna close to the signal and transmitted through a microwave connection over a long distance to the cable system, and (3) programs originating in the cable operator's own studio facilities. This last process is called cablecasting. SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 15-16 (1971) [hereinafter cited as SLOAN COMMISSION].

13. For a detailed description of cable technology, see SLOAN COMMISSION, *supra* note 12, at 11-16.

14. Today, cable systems serve several different functions. In addition to the function of retransmitting broadcast signals, cable operators produce, or originate, programs locally, and most significantly, for an additional monthly fee cable operators provide subscribers with access to services such as feature films, entertainment specials, and sporting events. Known as "Pay TV," this latter service seems to be the main attraction for new cable subscribers and is seen by the industry as one of the major growth areas in media. See Media Policy Session, *supra* note 11, at 27-29. The discussion in this Comment, however, is focused on the retransmission and cablecasting functions of cable systems because it is within these functions that cable has its greatest potential for providing public access.

ferred 120-channel capacity.¹⁵ This capacity sharply contrasts with the one-channel capacity of a broadcast television station. In 1981, cable systems represented a billion-dollar industry, with 4,400 operating cable systems serving over twenty-two million subscribers—almost twenty-eight percent of the total number of households with television.¹⁶

The growth of cable's multichannel technology is leading to "a communication revolution."¹⁷ As a cable system can simultaneously retransmit existing broadcast signals and originate its own programming, CATV has the ability to offer local and community services along with national communication services. This capacity for providing diversity on its channels through specialized programming is enhanced by the fact that, unlike broadcast television, cable systems derive their revenue directly from their audience through monthly fees.¹⁸ The list of possible communications services that cable can provide is extensive¹⁹ and expanding. These new technological abilities and the capacity for providing an inexpensive but efficient forum for local groups and diverse subjects contribute to the importance of cable television's development. Broadcast television, while providing many worthwhile services, has not sufficiently met the goals of providing diversity and a forum for local groups.²⁰

15. Media Policy Session, *supra* note 11, at 18. Most existing cable systems, however, have a capacity of 12 channels or fewer.

16. N.Y. Times, Nov. 1, 1981, § 3, at 4, col. 3.

17. SLOAN COMMISSION, *supra* note 12, at 2.

18. SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE, 94th Cong., 2d Sess. 3 (Staff Study 1976) [hereinafter cited as HOUSE Study].

19. *Id.*

20. See LaPierre, *Cable Television and the Promise of Programming Diversity*, 42 FORDHAM L. REV. 25, 31 n.34 (1973). For a detailed description of how CATV can be used to encourage citizen participation, raise the level of culture, and provide education and services to the public, see TALKING BACK: CITIZEN FEEDBACK & CABLE TECHNOLOGY (Ithiel de Sola Pool ed. 1973).

Greater diversity in broadcast television could result from the FCC's proposal to authorize new low-power television service. Notice of Proposed Rulemaking: In the Matter of an Inquiry into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System, 45 Fed. Reg. 69,178 (1980) (proposed Oct. 17, 1980) (printed in full at 82 F.C.C.2d 47 (1980)). The proposal allows television translators—low-power broadcast stations that receive a television signal on one channel, amplify it and transmit it on another channel—to conduct their own television operations. The purpose of inaugurating these new television stations is to fill the unsatisfied demand for new television service, especially at the local level. 82 F.C.C.2d at 48, 55, 60. Low-power television is ideal for locally originated programming of specialized community interest because of its low operating cost and technical simplicity in comparison to conventional television. *Id.* at 50, 80.

The low cost and the potential for reaching new audiences make low-power television attractive to commercial groups as well as to nonprofit local organizations. A broadcaster

The Regulation of Cable Television

The Communications Act of 1934²¹ is the foundation of the FCC's jurisdiction over CATV. Essentially unchanged since its enactment, the Act established a regulatory framework for communication by wire and radio and created an agency, the FCC, which has control over all forms of electrical communication.²² As cable television did not exist in 1934, the Act does not expressly provide for jurisdiction over cable systems. Congress, however, intended to give the FCC authority over all forms of communications technology.²³

During cable's early years, when cable was based almost exclusively in small communities with poor broadcast reception, the only means of regulating cable was through a local franchising process.²⁴ Local franchising continues today and requires that each cable operator obtain a community franchise granting authority to operate before running cable through public streets to reach subscribers' homes.²⁵ The power to demand a franchise enables communities to attach conditions to the franchise grant or contract, thereby enabling the local governing body to establish some control over the programming offered by the cable system.²⁶ One of the conditions that a community may attach to

that can obtain a network of low-power television stations can produce one type of programming at one station and rebroadcast it to its other distant stations at a low cost, thus making the venture profitable. Therefore, the competition for low-power television stations permits has been fierce. See Access, Feb. 9, 1981, at 1, 3.

The FCC has not yet determined how to allocate these stations and has frozen applications for them; 5,000 were on file pending the completion of its rulemaking process. 87 F.C.C.2d 610, 611 (1981).

21. 47 U.S.C. §§ 151-609 (1976).

22. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968); 47 U.S.C. § 151 (1976): "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . there is created a commission to be known as the 'Federal Communications Commission' . . ."

23. *FCC v. Midwest Video Corp. (Midwest II)*, 440 U.S. 689, 696 (1979); Communications Act of 1934, § 2(a), 47 U.S.C. § 152(a) (1976): "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . ." Cable does not fit into either category. It is, rather, a hybrid of radiowave broadcasting and wire communications.

24. Barnett, *State, Federal and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685 (1972) [hereinafter cited as Barnett].

25. *Id.* at 685. Local governments have a delegated power from the state to control the use of streets. *Id.* at 685 n.3; see *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). In a majority of states, local government controls the CATV franchising process. Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501, 508 (1977). Only 13 states have cable regulatory agencies. 1981 BROADCASTING CABLE YEARBOOK A-35. Only three states, Connecticut, Minnesota, and Rhode Island, have public access requirements. Access, Feb. 23, 1981, at 8.

26. Barnett, *supra* note 24, at 685-86.

a franchise agreement is a requirement that the cable operator permit access to one or more of its channels by members of the public.

Before the FCC assumed regulation of cable, the power of localities to negotiate the franchise agreement often resulted in a lack of protection for the public with respect to the nature of the programming offered by cable.²⁷ The first comprehensive regulation of CATV occurred in 1966.²⁸ The regulations prevented CATV systems from expanding into the markets of existing television stations and competing with them without demonstrating that the expansion would serve the public interest.²⁹

The FCC's authority to promulgate this complicated regulatory scheme to restrict CATV and protect conventional broadcasting was upheld by the Supreme Court in *United States v. Southwestern Cable Co.*³⁰ The Court held that the FCC had the authority under section 2(1) of the Act to regulate cable, at least to the extent that such regulation is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."³¹ The Court expressly limited its holding by stating that it expressed no view on the propriety of FCC regulation of cable for reasons other than the reduction of cable's impact upon conventional broadcasting.³²

Soon after *Southwestern*, the FCC changed the emphasis of its regulation of cable from protecting broadcasting to promoting the public interest through full utilization of the technological potential of cable.³³ The FCC decided that, because CATV systems can originate programs, or cablecast, CATV had the potential "for increasing the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service, without use of broad-

27. Political scandals and favoritism in dealings between cable operators and local authorities were common, and often there was neither competition for the franchise award nor public notice of the franchise process. *Id.* at 690-708.

28. Second Report and Order on Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 2 F.C.C.2d 725 (1966). The FCC first assumed jurisdiction over CATV in 1962 when it denied a microwave relay to a CATV system. *In re Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd.*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). The FCC reasoned that the importation of distant signals into the service area of a local television station would cause that station to lose viewers, thereby diminishing advertising revenue and possibly causing the station to go out of business. *Id.* at 465.

29. See LaPierre, *Cable Television and the Promise of Programming Diversity*, 42 FORDHAM L. REV. 25, 51-55 (1973).

30. 392 U.S. 157 (1968).

31. *Id.* at 178.

32. *Id.*

33. The Commission wanted to obtain, "consistent with the public interest standard of the Communications Act, the full benefits of developing [CATV] technology for the public" Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417 (1968).

cast spectrum.”³⁴ Accordingly, the FCC adopted rules in 1969 requiring a cable system having 3,500 or more subscribers to operate as a local outlet by originating some of its own programs.³⁵ A cable system that did not follow these rules could not carry the signal of any television station.³⁶

In 1971, Midwest Video Corporation, an operator of CATV systems, challenged the cablecasting requirements. The Eighth Circuit set the regulations aside,³⁷ but the Supreme Court reversed the Eighth Circuit, upholding the rules in *United States v. Midwest Video Corp. (Midwest I)*.³⁸ In a split decision, the Court held that the program origination rules met the “reasonably ancillary” standard enunciated in *Southwestern*, and that the FCC could “regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting.”³⁹

Promulgating the Access Rules

Midwest I firmly established the FCC’s authority to regulate cable television. In 1972, the FCC issued a comprehensive set of regulations

34. *Id.* at 421.

35. 47 C.F.R. § 74.1111(a) (1970) (repealed 1974).

36. *Id.* The rules had little effect because, first, at that time only 10% of all cable systems had 3,500 subscribers, and second, the rules were in constant suspension, that is, were pending review, until their repeal in 1974. 39 Fed. Reg. 43,302 (1974) (formally rescinding the mandatory origination rule). See LaPierre, *Cable Television and the Promise of Programming Diversity*, 42 FORDHAM L. REV. 25, 85 (1973).

37. *Midwest Video Corp. v. United States*, 441 F.2d 1322 (8th Cir. 1971), *rev’d*, 406 U.S. 649 (1972).

38. 406 U.S. 649 (1972). Other courts have interpreted the holding in *Midwest I* as permitting rules that would encourage diversity in broadcasting. Based on *Midwest I*, the Ninth Circuit explicitly approved the Commission’s broad authority to promulgate the 1972 access rules in *ACLU v. FCC*, 523 F.2d 1344, 1351 (1975). The District of Columbia Circuit assessed *Midwest I* in a similar manner in *National Ass’n of Reg. Util. Comm’rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976), stating: “Since a prime purpose in the area of broadcast regulation is the assurance of variety in what appears on the home viewer’s screen . . . ‘suitable diversified programming’ [on cable] is within the ancillarity standard [of *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)].” *Id.* at 615 (footnotes omitted). The court in *National Ass’n* ruled that there was no nexus shown between FCC preemption of regulation of two-way nonvideo leased access cable channels and the program diversity goal. In *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (1978), the Second Circuit approved FCC preemption of price regulation for pay cable because it furthered the program diversity goal. The FCC policy prohibited price restraints.

39. *Id.* at 667. The stated objectives stem from the Communications Act of 1934, ch. 652, tit. I, § 1, 48 Stat. 1064, 1064 (current version at 47 U.S.C. § 151 (1976)). See note 22 *supra*.

Chief Justice Burger, concurring, stated that the origination rule “strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts.” 406 U.S. at 676. He called for congressional “comprehensive reexamination of the statutory scheme” of the FCC in relation to CATV. He concluded, however, that “until Congress acts, the Commission should be allowed wide latitude.” *Id.*

that are the basis for the present rules regulating cable television.⁴⁰ The rules required *inter alia* that the cable systems in the top 100 cable markets dedicate four of their channels for public, governmental, educational, and leased access.⁴¹

In 1976, the FCC issued an order modifying the 1972 rules⁴² to ensure public access to cable systems of a designated size and to regulate the manner in which access was to be provided, including the charges that could be assessed for such access by cable operators.⁴³ The rules, which applied only to cable systems with more than 3,500 subscribers, required that each system have a twenty-channel capacity and capacity for two-way, nonvoice communications by 1986.⁴⁴ Each system was required to maintain four separate access channels—public, governmental, educational, and leased—but, absent full-time demand, the channels could be combined into one shared access channel.⁴⁵ Additionally, each cable system was required to make equipment available at a reasonable cost to those using the channels and at no charge on the public access channel for programs not exceeding five minutes in length.⁴⁶ Systems operators could have no editorial control of the content of access programming, except that they could adopt rules proscribing the transmission of obscene and indecent matter, lottery information, and commercial matter.⁴⁷ Furthermore, the regulations instructed cable operators to offer access on the public and leased channels on a first-come, nondiscriminatory basis.⁴⁸

The FCC expressed its rationale for the rules in terms of public benefit:

[These channels of communication can,] if properly used, result in the opening of new outlets for local expression, aid in the promotion of diversity in television programming, act in some measure to restore a sense of community to cable subscribers and a sense of openness and participation to the video medium, aid in the functioning of

40. Cable Television Service; Cable Television Relay Service, 37 Fed. Reg. 3251 (1972), *modified*, Cable Television Report and Order, 54 F.C.C.2d 207 (1975) (extending compliance deadlines from 1977 to 1986).

41. 36 F.C.C.2d 143, 240-41 (1972).

42. 1976 Report and Order, 59 F.C.C.2d 294 (1976).

43. *Midwest II*, 440 U.S. 689, 692 (1979).

44. Codified at 47 C.F.R. § 76.252 (1980).

45. Codified at 47 C.F.R. § 76.254 (1980).

46. Codified at 47 C.F.R. § 76.256 (1980).

47. *Id.* The Court of Appeals for the District of Columbia stayed the regulation requiring promulgation of rules prohibiting the transmission of obscene and indecent material on access channels in an order filed in *ACLU v. FCC*, No. 76-1695 (D.D.C. Aug. 26, 1977) (unpublished order); therefore, the rule was never put into effect. Today there is no obscenity prohibition on access channels, although there is such a prohibition with respect to programming over which the cable operator has editorial control. 47 C.F.R. § 76.215 (1980); *see* 87 F.C.C.2d 40, 43 (1981).

48. 47 C.F.R. § 76.256 (1980).

democratic institutions, and improve the informational and educational communications resources of cable television communities.⁴⁹

Industry Opposition to the Access Rules

Although the 1976 modifications relaxed the requirements of the 1972 rules, the cable industry had major objections to the access rules.⁵⁰ Cable operators objected that the rules force common carrier obligations on cable operators in violation of section 3(h) of the 1934 Communications Act⁵¹ and that they intrude on the first amendment rights of cable operators.⁵² Deciding to promulgate the rules, the FCC rejected the operators' first argument, explaining that, because cable operators are neither broadcasters nor common carriers, but are a hybrid,⁵³ denominating the rules as common carrier in nature is immaterial as long as the rules promote the public interest statutory objectives of the FCC.⁵⁴ The FCC also rejected the second argument, stating that the access rules promote "an uninhibited marketplace of ideas" in lieu of the "monopolization of that market" by the government, private broadcasters, or cable owners,⁵⁵ and thus the rules further first amendment rights of the public to a greater extent than they impair the first amendment rights of cable owners.

Judicial Opposition to the Access Rules: FCC v. Midwest Video Corp.

In 1977, Midwest Video Corporation (Midwest) and the American Civil Liberties Union (ACLU) sought review of the 1976 order in *Midwest II*.⁵⁶ Midwest challenged the regulations as outside the jurisdiction of the FCC and in violation of the free press clause of the first amendment⁵⁷ and the due process clause of the fifth amendment.⁵⁸ The ACLU challenged the weakening of the regulations as an improper retreat from the FCC's obligation to regulate cable, as exces-

49. 59 F.C.C.2d 294, 296 (1976).

50. *Id.* at 297-98 (1976).

51. "[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h). For a discussion of the meaning of common carrier, see text accompanying notes 65-67 *infra*.

52. 59 F.C.C.2d 294, 298 (1976).

53. Each is regulated by a separate section of the Act. Common carriers are subject to title II, 47 U.S.C. §§ 201-223 (1976), while broadcasters are regulated by title III, 47 U.S.C. §§ 301-389 (1976).

54. 59 F.C.C.2d 294, 299 (1976).

55. *Id.* (quoting *Red Lion Broadcasting v. FCC*, 395 U.S. 371, 390 (1969)).

56. 571 F.2d 1025, 1029 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

57. 571 F.2d at 1029. "Congress shall make no law . . . abridging the freedom . . . of the press" U.S. CONST. amend. I.

58. 571 F.2d at 1029. "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend V.

sively harmful to the interests of access program producers, and as a violation of the first amendment goals of diversity and freedom of expression.⁵⁹

The Eighth Circuit agreed with *Midwest* and held that the FCC acted outside its jurisdiction when it imposed a limited form of common carrier access responsibilities on cable systems.⁶⁰ As the Communications Act contained no specific grant of authority over cable systems to the FCC to assert jurisdiction over the cablecasting function of cable systems, the FCC had to equate "cablecast" with "broadcast" under a "reasonably ancillary" theory.⁶¹ Therefore, the court held that the access rules violated the statutory mandate that broadcasters may not be treated as common carriers.⁶²

The Supreme Court upheld the Eighth Circuit, agreeing that the rules impermissibly imposed common carrier obligations on cable operators.⁶³ The Court concluded that the access rules imposed common carrier obligations because they required cable operators to offer the access channels on a first-come, nondiscriminatory basis, prohibited the operator from asserting any editorial control over content of access programming, and limited the fee operators' charge for access and equipment usage.⁶⁴

Section 3(h) of the Act defines a common carrier as "any person engaged as a common carrier for hire"⁶⁵ This definition has been construed to mean that a communications operator is a common carrier when it offers the use of its communications system to the public on a nondiscriminatory basis and allows complete customer control over the content of the communication.⁶⁶ Examples of communications common carriers are telephone and telegraph companies.⁶⁷

For an interpretation of section 3(h), the *Midwest II* majority relied on the 1973 case, *Columbia Broadcasting System v. Democratic National Committee*⁶⁸ and stated that "Congress has restricted the

59. 571 F.2d at 1029.

60. *Id.* at 1029, 1048-52. The court based its decision solely on jurisdictional grounds. The opinion, however, does include a lengthy discussion of the constitutional issues, in which Chief Judge Markey favors the position of *Midwest*. *Id.* at 1052-59.

61. *Id.* at 1037-40, 1051.

62. *Id.* at 1051 & n.65.

63. *Midwest II*, 440 U.S. 689, 700-02 (1979). See note 51 *supra*.

64. *Id.* at 701-02.

65. 47 U.S.C. § 153(h) (1976).

66. 440 U.S. at 701; see *National Ass'n of Reg. Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). See generally Note, *Common Carriers Under the Communications Act*, 48 U. CHI. L. REV. 409 (1981) (analysis of judicial definitions of communication common carriers).

67. See 47 U.S.C. §§ 221-222 (1976).

68. 412 U.S. 94 (1973). The *CBS* case involved a complaint filed with the FCC by the Business Executives' Move for Vietnam Peace, alleging that a radio station had refused to

Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting."⁶⁹ The *CBS* Court had interpreted the 1934 Act as intending that private broadcasting, with its limited spectrum space, "develop with the widest journalistic freedom consistent with its public obligations."⁷⁰ The *CBS* Court determined that the Act's provision for periodic license renewal proceedings,⁷¹ granting the listening public an opportunity to express its opinion about the quality of programming, was sufficient to ensure that government power would be properly asserted within the framework of the Act "when the interests of the public are found to outweigh the private journalistic interests of the broadcasters."⁷²

In summary, by broadly interpreting section 3(h) of the 1934 Act, the *Midwest II* Court struck down the access rules solely on a jurisdictional basis. As the rules transferred control of some of the cable system's channels from the system's owner, thus imposing a financial burden, and as the rules abrogated control over the content of some of its programming, thus imposing an editorial burden, the Court held that the cable operator was being treated impermissibly as a common

sell it air time for editorial announcements, thereby violating the first amendment and the Fairness Doctrine. The Fairness Doctrine obligates a broadcaster to allow a candidate for public office to use its facilities, once the broadcaster has allowed an opposing candidate to do so. It was originally enacted as § 18 of the Radio Act of 1927, 44 Stat. 1162, 1170, and later incorporated into the Communications Act by Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, 557 (current version at 47 U.S.C. § 315(a) (1976)). The Fairness doctrine is discussed at notes 211-17 & accompanying text *infra*. For a discussion of other provisions of § 315(a), see notes 172-75 & accompanying text *infra*.

The Democratic National Committee joined, requesting a declaratory ruling from the FCC that the first amendment and the Communications Act prohibit a broadcaster from having a policy of refusing to sell air time to responsible entities that wish to present their views on public issues. The Court ultimately held that broadcasters have a first amendment right of editorial freedom and cannot be forced to accept editorial advertisements. 412 U.S. 94, 101-14 (1973). In analyzing the legislative history of the Radio Act of 1927, the precursor of the Communications Act, the Court found that "Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *Id.* at 105.

69. 440 U.S. at 707.

70. 412 U.S. at 110.

71. Until 1981, broadcast licenses were issued or renewed for three-year periods. See 47 U.S.C. § 307(d) (1976). On July 31, 1981, Congress extended broadcast license periods to five years for television and seven years for radio. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1241, 95 Stat. 357, 736.

72. 412 U.S. at 110. The *CBS* Court also quoted, as proof of congressional intent of journalistic freedom, § 326 of the Act: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." *Id.*

carrier.⁷³ The *Midwest II* Court concluded that only Congress could compel cable operators to provide common carriage of public-originated transmissions⁷⁴ and that the FCC had exceeded its authority under the 1934 Act.

The conclusion of the majority in *Midwest II* rests on three grounds. First, the absence of a public access requirement within the Act can be interpreted as reflecting a congressional intent to forbid mandated public access to cable television. Second, broadcasting is equivalent to cable television for purposes of the section 3(h) prohibition concerning common carriers. Third, the economic and editorial burden imposed upon cable owners by the access rules is prohibited by law. A critical analysis of these bases, however, reveals serious problems with the Court's decision.

Congressional Intent

The *CBS* Court's interpretation of the congressional intent in 1927 and 1934 is inapplicable to regulation concerning cable television.⁷⁵ First, although each traditional broadcasting station has only one channel or wavelength, a cable operator has a large number of available channels. A public access requirement might severely displace air time available to the single-channel broadcaster for advertising, its primary source of income.⁷⁶ The multichannel cable operator, faced with a requirement that a given amount of time be available for public access, would have ample time on other channels. Additionally, cable owners receive the bulk of their revenue from monthly subscription fees, not from advertising.⁷⁷ Thus, as revenue-producing programming is not essential to a cable system, there is little danger that displacement by public access programming will substantially interfere with the financial support of a cable system. The argument that "it is physically impossible to provide time for all viewpoints"⁷⁸ is not applicable to a mass medium capable of providing virtually unlimited channel capacity.⁷⁹

73. *Midwest II*, 440 U.S. at 700-01, 707-08 & n.17.

74. *Id.* at 709.

75. The dissent in *Midwest II* argued that § 3(h) did not grant or deny the FCC any substantive authority, but merely prohibited the *automatic* imposition of common carrier status on every broadcasting station simply because the station is engaged in radio broadcasting. Thus the FCC might still impose a requirement, even though that requirement might be termed a "common carrier obligation." *Id.* at 710-11 (Stevens, J., dissenting). The dissent also argued that cable systems were outside of § 3(h) by their nature as cablecasters rather than broadcasters. *Id.* at 711 n.3.

76. See Note, *The Invalidation of Mandatory Cable Access Regulation: FCC v. Midwest Video Corp.*, 7 PEPPERDINE L. REV. 469, 486 (1980).

77. See Media Policy Session, *supra* note 11, at 27.

78. 412 U.S. at 111.

79. Note, *FCC Regulation of Cable Television*, 54 N.Y.U. L. REV. 204, 228 (1979).

A second reason for finding the congressional intent regarding the regulation of traditional broadcasting inapplicable to an analysis of cable television is that the license renewal procedure, designed to ensure that the broadcaster will conform to its public interest obligations, does not exist for cable systems. Instead, cable systems secure a franchise from the local governing authority, and a franchise can extend for as long as twenty-five years.⁸⁰ In addition, frequently the only matter of renegotiation while the franchise exists is the amount of fees paid to the municipality. Until recently, the FCC had minimum franchise standards, but now state or local authorities, whose enforcement powers are uncertain, prescribe most of the rules for the franchise.⁸¹ Thus, there is no automatic, periodic review by a federal agency to protect the public interest.

A third reason for distinguishing the applicability of the rationale employed in *CBS* from the rationale that should be employed to analyze cable television regulation is that the *CBS* Court placed great emphasis on the adoption of section 326 of the Act, which prohibits FCC censorship of or interference with free speech.⁸² In both *CBS* and *Midwest II*, the Court interpreted this section as evincing "Congress' flat refusal to impose a common carrier right of access for all persons wishing to speak out on public issues."⁸³ The Court thus suggested that Congress preferred that the private broadcaster, rather than the government, select whose voice should be heard.

The cable access rules at issue, however, do not contravene section 326. The rules merely require that *some* channel space be made available to the public, free from journalistic or governmental censorship.⁸⁴ In contrast to the *CBS* decision,⁸⁵ the regulations would not require the FCC to supervise the daily operations of a broadcaster's conduct: no government regulation other than the initial promulgation of the rules

80. See, e.g., San Francisco, Cal. Ordinance 541-80 (Nov. 10, 1980) (amending Ordinance 105-64) (granting Viacom Cablevision Co. a 25-year franchise).

81. For the remaining standards, which govern the amount of franchise fees, see 47 C.F.R. §§ 76.30, 76.31 (1980). An amendment to S. 898, 97th Cong., 1st Sess. (1981) (entitled the "Telecommunications Competition & Deregulation Act of 1981"), a bill deregulating most aspects of the telecommunications industry except basic telephone service, would have prohibited any rate regulation of cable services. The amendment was deleted just before the bill passed the Senate on Oct. 7, 1981, due to efforts by Communications Subcommittee Chairman Barry Goldwater, who argued that the amendment had not received sufficient consideration and had only been included in the bill because of "nefarious" deals by cable industry lobbyists. *Los Angeles Daily J.*, Oct. 7, 1981, at 7.

For a general discussion of franchising, see notes 126-49 & accompanying text *infra*.

82. 47 U.S.C. § 326. See note 72 *supra* for text of § 326.

83. *Midwest II*, 440 U.S. at 704; *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 110.

84. Although the rules required obscenity censorship, such censorship is not seen as an imposition on broadcasters, and in fact these rules were never implemented. See note 47 *supra*.

85. 412 U.S. at 127.

was required. The rules provided that no one would have control of the content of the programming. Furthermore, journalistic freedom would still be maintained on most of the cable system's channels. Section 326 was conceived at a time of broadcast frequency scarcity and thus would not prohibit public access rules today on a technologically different medium on which there is no such scarcity.

The distinctions between traditional broadcasting media and cable weaken any argument to support application of the congressional intent of 1934 to regulation of cable television. Different media require different standards for regulation. Therefore, *Midwest I*'s reliance on *CBS*, which involves a different medium, is misplaced. The result of relying upon *CBS* was that the Court in *Midwest II* failed to analyze cable as a telecommunications technology with distinct characteristics.

Section 3(h)

The *Midwest II* Court relied on *CBS* for its interpretation of section 3(h).⁸⁶ A close analysis of section 3(h), however, indicates that the Court's reliance on that provision and the Court's use of *CBS* as precedent for its decision were misplaced.

Section 3(h) of the Act states that a person engaged in broadcasting shall not be deemed a common carrier.⁸⁷ Common carriers and broadcasters are governed by different sections of the Act: Title II regulates common carriers⁸⁸ and Title III regulates broadcasters.⁸⁹ Section 3(h) is definitional; it was included in the Act so that broadcasters would not be regulated by the title that regulates common carriers, but it was not intended to prevent the imposition of any type of common carrier obligation.⁹⁰ As it was merely definitional, section 3(h) was not drafted as a denial of any substantive authority of the FCC.⁹¹

The majority, however, construed the section to deny the authority of the FCC to impose public access requirements on broadcasters.⁹² The majority then extended the application of section 3(h) to cable operators because both broadcasters and cable operators have "a significant amount of editorial discretion regarding what their programming will include,"⁹³ and the legislative history of section 3(h) indicates "Congress' stern disapproval"⁹⁴ of any negation of that editorial discretion.

86. See notes 63-69 & accompanying text *supra*.

87. 47 U.S.C. § 153(h) (1976).

88. *Id.* at §§ 201-223 (1976).

89. *Id.* at §§ 301-386 (1976).

90. 440 U.S. at 710-11.

91. *Id.*

92. *Id.* at 705.

93. *Id.* at 707.

94. *Id.* at 708.

This treatment, however, ignores the differences between broadcasting and cable. Cable operators are not broadcasters, but "are engaged in the distinct process of 'cablecasting.'" ⁹⁵ Unlike broadcasters with one channel or station, cable operators operate multichannel systems, and thus, except on the small percentage of their channels devoted to public access, maintain their editorial discretion. Additionally, cable operators do not make use of the broadcast spectrum ⁹⁶ and so are not subject to Title III of the 1934 Act, which regulates broadcasters. ⁹⁷ Furthermore, cable systems act principally as conduits of programming that has already been broadcast or transmitted, and therefore cable operators ordinarily exercise little editorial judgment in selecting programming. ⁹⁸

Thus, the distinction between the operation of traditional one-channel broadcasting and cable television indicates that the rationale employed by the courts to prohibit imposing any common carrier obligations on one-channel media such as television or radio is not applicable to the regulation of multichannel cable systems. ⁹⁹ To the extent that section 3(h) can be held to prohibit public access, this prohibition should not be extended to the technically distinct medium of cable television.

The Burdens Imposed by Requiring Public Access Channels

Editorial Burden

The Court in *Midwest II* held that the FCC had exceeded its jurisdiction by promulgating the access rules. ¹⁰⁰ One basis for the Court's decision was that the FCC exceeded its authority when it deprived cable operators of editorial discretion over access channels. ¹⁰¹ The degree of loss of editorial control over programming is negligible, however, because most cable operations involve the repetition of other

95. *Id.* at 711 n.3 (Stevens, J., dissenting); see also *Teleprompter v. CBS*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 400 (1968) (cable systems are not broadcasters but are simply transmitters of broadcast material).

96. That is, the frequency spectrum over which broadcasters transmit signals.

97. *Cf. ACLU v. FCC*, 523 F.2d 1344, 1351 (9th Cir. 1975) (as neither Title II nor Title III specifically addresses the problems of CATV, these restrictions do not apply). Nor are cable operators subject to Title II. *Id.*

98. Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. CAL. L. REV. 1001, 1026 (1981) [hereinafter cited as Kreiss].

99. This possibility was acknowledged in 1975 by the House of Representatives in a staff study approving the FCC requirement of a local access and leased access channel. The study, however, disapproved of imposing free educational and governmental channels because of the financial burden on the cable operator. HOUSE Study, *supra* note 18, at 73.

100. 440 U.S. at 708.

101. *Id.* at 711 n.3. This was the basis for the Court's decision that the outer limits had been strained, but this holding was based on a questionable interpretation of the legislative intent in promulgating § 3(h). See notes 75-85 & accompanying text *supra*.

television signals, and the only decision made by cable operators is whether to carry a particular signal. Only on local cablecast channels is complete editorial control retained by the cable operator.¹⁰² To many authorities, the small burden of losing editorial discretion over the few access channels is outweighed by the overall benefit to the public of the access channels.¹⁰³

Economic Burden

The Court in *Midwest II* was not solely concerned with the editorial burden imposed by the access rules. A further reason for its decision was the displacement of alternative programming and the restrictions on expansion of other cable services that accompanied the mandatory access rules.¹⁰⁴ The Court also suggested that the access rules obligated cable operators to make equipment available to access users at low or no cost¹⁰⁵ and that therefore a financial burden would be inflicted upon cable operators by the imposition of mandatory access rules.

In *Midwest I*, the Court upheld rules requiring cable operators to produce or originate some of their own programming.¹⁰⁶ In *Midwest II*, the Court struck down rules requiring cable operators to make space available for others to produce programming. The argument that the economic burden is a reason for invalidating the access rules, however, is specious; the financial burden on cable operators created by requiring public access is unlikely to be greater than the financial burden created by requiring local origination.

In 1974, when both origination and access requirements were in existence, the FCC, in considering whether to amend or eliminate the mandatory origination requirement, requested comments about that requirement from all interested parties.¹⁰⁷ The majority of responding parties recommended that the rule be eliminated. One reason for this recommendation was that the rule "diverted facilities, capital and personnel to the production of 'substandard' programming for which there [was] no significant demand."¹⁰⁸ Other reasons included the programs' difficulty in attracting advertisers¹⁰⁹ and in meeting the Fairness Doc-

102. See note 12 & accompanying text *supra*. Furthermore, cable systems are specifically forbidden by the Copyright Act of 1976 to edit any retransmitted programming. 17 U.S.C. § 111(c)(3) (Supp. III 1979).

103. See notes 196-223 & accompanying text *infra*.

104. 440 U.S. at 707 n.17.

105. *Id.* at 693-94.

106. 406 U.S. 649, 674-75 (1972).

107. Notice of Proposed Rulemaking and of Inquiry, 46 F.C.C.2d 139 (1974).

108. Report and Order, 49 F.C.C.2d 1090, 1094 (1974).

109. *Id.* Locally originated programs do carry advertising. See note 165 & accompanying text *infra*.

trine requirement.¹¹⁰

Most significantly, the cable operators requesting elimination of the origination rules suggested that access channels were a less burdensome way of accomplishing the FCC's goals.¹¹¹ The operators asserted that providing equipment, as required by the access rules, was less expensive and less burdensome than the financial costs associated with the local origination requirement.¹¹²

As a result of these comments and because the FCC also believed that the access rules were a less burdensome way to accomplish the goals of diversity and community self-expression, the FCC eliminated the mandatory origination rules while leaving in force the public access rules.¹¹³

Although the FCC had considered the question of the viability of public access rules, the majority in *Midwest II* struck down these rules, apparently ignoring the maxim of administrative law that a finding of an administrative agency should be accorded significant weight.¹¹⁴ The Court is not bound by administrative decisions such as the one made by the FCC regarding the lesser cost of access programming,¹¹⁵ but "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction."¹¹⁶ Thus, the determination by the FCC that the access rules were less financially burdensome than the origination requirements should have carried much weight.

The economic burden of the access rules with which the *Midwest II* Court was concerned could also have been alleviated if the FCC

110. Report and Order, 49 F.C.C.2d at 1096. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 371, 375-79 (1969). See notes 226-31 & accompanying text *infra* (explanation of Fairness Doctrine).

111. 49 F.C.C.2d 1090, 1095-96 (1974).

112. *Id.* at 1100.

113. 440 U.S. at 709 (Stevens, J., dissenting). The FCC's rationale for eliminating the origination rules was as follows: "Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require origination has been the expenditure of large amounts of money for programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop, regardless of specific legal requirements." 49 F.C.C.2d at 1105.

114. *Zemel v. Rusk*, 381 U.S. 1, 11 (1965).

115. See Note, *FCC v. Midwest Video Corporation: One Less Cable Restraint*, 41 OHIO STATE L.J. 575, 580 (1979).

116. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 381; see also *Zemel v. Rusk*, 381 U.S. at 11-12; Francis Biddle Lecture by Chief Judge J. Skelly Wright of the District of Columbia Court of Appeals at Harvard Law School (Oct. 16, 1979), reprinted in 15 HARV. C.R.-C.L. L. REV. 1 (1980) (courts should do no more than keep administrative agencies within constitutional bounds).

had followed the implementation of the rules. The FCC has followed a consistent policy of relaxing its rules when they might cause undue economic hardship.¹¹⁷ Thus, it seems illogical to use the rationale of impermissible economic burden to strike down the less burdensome access rules.

The *Midwest II* Court's reliance upon the Communications Act of 1934 and its underlying congressional intent to prohibit mandatory public access to cable television was not well founded. Nor do the editorial and financial burdens imposed on cable operators by access requirements seem sufficiently oppressive to have warranted the invalidation of the access rules. Other factors indicate that access rules such as the ones invalidated in *Midwest II* are desirable.

A Need for Regulation

Statutory Goals

In *Midwest I*, the local origination rules were upheld as serving the FCC's statutory goals of establishing more outlets for community expression and increasing the diversity of programming.¹¹⁸ The attainment of these same goals should be sufficient to support the access rules. In *Southwestern* and *Midwest I*, the Court recognized the need to give the FCC sufficient latitude to cope with technological developments in the rapidly changing field of television media.¹¹⁹ The rules struck down in *Midwest II* are a logical extension of the authority given to the FCC to regulate the communications industry.¹²⁰ An outdated

117. The original access rules required the larger cable systems to develop 20-channel capacity, with four of those channels reserved for public access. Realizing the financial burden involved, the FCC amended the rules in 1976 to make them less onerous. Report and Order, 59 F.C.C.2d 294 (1976). These changes extended the compliance deadline until 1986 and provided that, until public demand existed, the cable operator could meet the access requirement by providing fewer than four channels. The modification also limited the application of the rules to cable systems having 3,500 or more subscribers. *Id.* The modified rules are located at 47 C.F.R. §§ 76.252-.256 (1980). Furthermore, in 1978, the FCC determined that the rules did not require cable operators to provide live cablecasting when taping facilities were made available to access users. *In re Teleprompter of Worcester, Inc.*, 67 F.C.C.2d 643, 648 (1978). The amended version of the access rules seemed less financially burdensome than the local origination rules, which were upheld in *Midwest I*.

118. 406 U.S. at 668-70. Until *Midwest II*, the Supreme Court and the majority of the courts of appeals had approved FCC regulations, such as mandatory access, as furthering the goal of increasing program diversity. See cases cited note 38 *supra*. *Midwest II* is a reversal of this approval policy.

119. *Home Box Office Inc. v. FCC*, 567 F.2d 9, 27-28 (1977) (interpreting *Southwestern* and *Midwest I*).

120. The *CBS* Court had previously recognized the possibility of future access requirements when it stated: "Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable. Indeed, the Commission noted in these proceedings that the advent of cable television will afford increased opportunities for the discussion of public issues. In its pro-

classification of modern technology should not be used to abrogate that authority.¹²¹

Future Demand for Access

One argument against mandatory access rules is that there is no demand for public access to cable television.¹²² This argument ignores the fact that there will be little demand for access as long as the public is ignorant of the opportunity for access. In addition, as more homes are wired for cable, public awareness and public demand for access to a cable channel will increase. When that happens, the burden imposed on the cable operator will be much greater if it is forced by the public or the courts to eliminate programming already developed to make channels available for public use.¹²³ Many franchises run for as long as

posed rules on cable television the Commission has provided that cable systems in major television markets 'shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel.' " 412 U.S. at 131 (quoting 37 Fed. Reg. 3289, 76.251(a)(4)). Thus, in 1972 the Court found nothing wrong with the rules it subsequently voided in 1979.

Additionally, in *Red Lion* the Court recognized "the legitimate claims of those unable without governmental assistance to gain access to [broadcast] frequencies for expression of their views" 395 U.S. at 400 (upholding the Fairness Doctrine).

121. One major reason for the *Midwest II* Court's decision may have been its desire to spur Congress to take action on the issue after 45 years of congressional inaction. The Court ended its opinion with an admonition that it was up to Congress to pass new legislation for public access regulations to be valid. 440 U.S. at 709.

A number of bills have been introduced recently to amend the Communications Act. On October 7, 1981, the Senate passed a bill that would initiate deregulation in most segments of the telecommunications industry. S. 898, 97th Cong., 1st Sess. (1981). An amendment deregulating CATV rates was abandoned. Broadcasting, Oct. 12, 1981, at 27. The House held hearings on the matter in September, but no action is expected until the summer of 1982. Broadcasting, Sept. 21, 1981, at 52. San Francisco Chronicle, Nov. 4, 1981, § 1, at 12.

The FCC apparently favors deregulation. Radio was deregulated in the fields of nonentertainment programming, commercialization and other areas in January 1981. Report and Order, 84 F.C.C.2d 968 (1981). FCC Chairman Mark S. Fowler has made speeches in support of deregulation of broadcasting. Broadcasting, Sept. 28, 1981, at 19. Moreover, the FCC has urged Congress to repeal the Fairness Doctrine and to change the general purposes of the Communications Act to rely on "relevant marketplace forces" to determine the availability of communications services to the public. Broadcasting, Sept. 21, 1981, at 23. Arguably, deregulation of cable will not be in the public interest. HOUSE STUDY, *supra* note 18, at 5-6; SLOAN COMMISSION, *supra* note 12, at 5-8; Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659, 702-05, 708 (1975); see also Media Policy Session, *supra* note 11, at 20-21. This might leave access in the hands of those who can afford to pay for it, a situation that the Supreme Court has viewed with disfavor. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 123; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 392.

122. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1062 n.87 (8th Cir. 1978).

123. Not all available channel space is utilized at this point in the development of cable.

twenty-five years,¹²⁴ and in that period a cable operator might activate all of its channels. Today, all that is required for the cable operator to make a channel available for public access is to open up an unused channel.¹²⁵ Thus, it is best to require the reservation of access channels upon the grant of a franchise, even if current demand for an access channel is not great.

Franchising Problems

Cable systems operate pursuant to a franchise that grants the cable operator authority to construct and operate its system within a defined area for a prescribed period of time.¹²⁶ The franchising authority is a municipality that can negotiate for the services it desires from the cable operator.¹²⁷

For several reasons, however, the local governing authority frequently lacks the resources or ability to regulate the ongoing operations of a cable operator effectively. Franchises are generally in the form of contracts, not ordinances, and so cannot be unilaterally revoked by the municipality. After a franchise has been granted, therefore, municipalities lose most of their bargaining power and much of their ability to regulate the operation of the cable operator unless the franchising authority had the foresight to include certain adjustment clauses in the contract.¹²⁸ Moreover, after the execution of a franchise agreement, the local government often lacks the opportunity or expertise to monitor the cable operator, even when participation by local officials is included in the contract.¹²⁹

In 1972, the FCC issued a set of cable regulations that included minimum standards that localities had to maintain during the franchising process.¹³⁰ These standards concerned the areas of public proceedings, construction timetables, franchise duration, installation and

Thus, institutionalizing access channel requirements now does not take away any revenue-producing channels from the operator. Forced preemption of operating channels when there is more demand for access in the future would probably result in litigation by cable operators.

124. See note 80 *supra*.

125. See note 123 *supra*.

126. See generally W. BAER & M. BOTEIN, *CABLE TELEVISION: FRANCHISING CONSIDERATIONS* (1974).

127. See note 25 & accompanying text *supra*.

128. Barnett, *supra* note 24, at 699; M. HAMBURG, *ALL ABOUT CABLE* 237 (1979). Professor Hamburg includes in his book a sample franchise agreement supplied by Viacom International, Inc., one of the largest cable operators and an offshoot of CBS. The agreement does not mention any public access channels or local programming, thus illustrating that a cable operator will not supply any public services it is not forced to supply. *Id.* at 334-48.

129. Barnett, *supra* note 24, at 698-700; M. HAMBURG, *ALL ABOUT CABLE* 237 (1979).

130. Cable Television Report & Order, 36 F.C.C.2d 141 (1972).

subscription rates, compliance procedures, and franchise fees.¹³¹ The 1972 order also included the public access and local origination rules,¹³² which assumed control of the entire field of regulation of access by requiring municipalities to follow the federal rules on the subject.¹³³ These rules were partially a response to municipal abuse of the negotiation of franchise agreements¹³⁴ and were designed to ensure the development of cable television in the public interest.¹³⁵

The origination rules were repealed in 1974,¹³⁶ however, and the public access rules were struck down in *Midwest II*; therefore, there is no longer any federal regulation in these areas. Furthermore, in 1977, all the franchising standards, except for the minimum fee rule, were changed to "non-mandatory guidelines."¹³⁷ Cable operators are no longer required to file a statement with the FCC "explaining how the system's franchise is consistent with Federal standards."¹³⁸ Deregulation by the FCC thus has left municipalities substantially alone in dealing with cable operators. The status of regulation of cable television has regressed to pre-FCC days, when local authorities dealt with cable operators in the absence of federal guidance and subject only to minimal federal regulations.¹³⁹

The demise of the access channel rules and the general deregulation of many aspects of cable, however, have some benefits. Without federal regulation, state and local governments are free to promulgate

131. *Id.* at 171-87.

132. See text accompanying note 40 *supra*.

133. See W. BAER & M. BOTEIN, *CABLE TELEVISION: FRANCHISING CONSIDERATIONS* 262 (1974).

134. Local authorities had often considered the franchising process as one of ensuring new revenues for the municipality, and not of securing state-of-the-art services for the community. SLOAN COMMISSION, *supra* note 12, at 152.

135. See S. RIVKIN, *A NEW GUIDE TO FEDERAL CABLE REGULATIONS* (1978) (overview of the rules as of 1977).

136. See note 36 *supra*.

137. 47 C.F.R. § 76.31 (1980) (codifying 42 Fed. Reg. 52,416 (1977)).

138. 42 Fed. Reg. 52,405 (1977). These statements, called certificates of compliance, 47 C.F.R. § 76.11 (1978), were required until 1978, when they were replaced by registration statements. 43 Fed. Reg. 49,008 (1978). The registration statements require little of substance. See 47 C.F.R. § 76.12 (1979).

139. Most aspects of cable have been deregulated. The remaining rules are contained in 47 C.F.R. §§ 76.1-.617 (1980). In 1980, many of the remaining rules were deleted, including §§ 76.151-.161 (distant signal carriage and program exclusivity, 79 F.C.C.2d 652 (1980)) and §§ 76.252-.258 (channel capacity and access channels, 83 F.C.C.2d 147 (1980)). See generally Besen & Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 76 (1981).

Today, however, the public is more aware of what cable has to offer, and there are numerous media reform groups to which a city can turn for guidance. A directory of such groups is available from the National Citizens Committee for Broadcasting, located in Washington, D.C.

their own rules and to negotiate their own terms for cable franchises.¹⁴⁰ As the demand for cable has become so great,¹⁴¹ access is now an item to be bid upon, and a cable operator that offers little access may have a franchise bid rejected in favor of a bid from another operator offering more access. Municipalities usually can obtain favorable terms in a franchise agreement from the operator, because city cable franchises now have become a lucrative investment for operators.

Municipalities, however, often may be unable to extract adequate assurances from a cable operator about public access¹⁴² because municipal authorities may be ignorant of the issues surrounding access and the technology of cable television, and ask for too little in return for a franchise.¹⁴³ Municipalities might prefer to collect revenues from the franchise fee—usually five percent of gross receipts—rather than to insist on access for their citizens. Moreover, ownership within the cable industry is so concentrated¹⁴⁴ that “it may be impossible for cities to deal with operators in any manner approaching parity,”¹⁴⁵ and thus the

140. One new rule is CAL. GOVT. CODE § 53066.1 (West 1981). Passed in September 1979, it deregulates the rates a cable operator may charge if the system provides a community services channel program. The California law provides more access and access-related services than the FCC rules provided, but is completely voluntary on the part of the cable operator.

141. Besen & Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 76, 110 (1981).

142. For an informative guide, see Owens, *The Cable Franchising Process: Caveat Emptor*, Access, March 10, 1980, at 1. If a franchisor follows the rules provided there, it is likely that the best possible public access service will result. Another guide for local officials is M. BOTEIN & B. PARK, WHAT TO DO WHEN CABLE COMES TO TOWN: A HANDBOOK FOR LOCAL OFFICIALS (1980) (published by the Communications Media Center of the New York Law School). Other similar guides have recently become available.

Even when public access service is obtained, it is not guaranteed to be permanent. There is a growing tendency for franchise applicants to offer extensive packages to obtain the potentially lucrative franchise. If the franchise proves to be unprofitable, however, it is possible that local authorities will be faced with having to accept either a reduction in services or an increase in the rates charged by the cable operator. If there is a reduction, it is probable that the unremunerative services such as public access will be the first to be eliminated. Besen & Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 76, 121 (1981).

143. “[A] city unprepared for a whirlwind promotional campaign by a skilled national organization may well find itself unable . . . to resist accepting a cable industry prepared franchise.” R. JACOBSON, MUNICIPAL CONTROL OF CABLE COMMUNICATIONS 35 (1977).

144. *Id.* As of 1979, 26% of all cable households were served by the five largest cable companies, while the top 25 served 54% of all subscribers. The largest company, Teleprompter, owns 110 cable systems, serving 1.1 million subscribers, or approximately nine percent of all United States cable subscribers; see Media Policy Session, *supra* note 11, at 23. Joint ventures in newer cable services are increasing between cable operators, the networks, and even AT&T, thereby paving the road to greater concentration in the communications industry. See also Broadcasting, Sept. 28, 1981, at 2.

145. R. JACOBSON, MUNICIPAL CONTROL OF CABLE COMMUNICATIONS 39 (1977). Mr. Jacobson advocates municipal ownership and operation of a cable system as the best way to

community might reject any rights of access for its citizens in return for guaranteed revenue from a cable operator.

Cable operators at times have improperly pressured municipalities in order to secure franchise agreements.¹⁴⁶ Many franchise agreements are negotiated by unqualified local officials, a fact indicating that a degree of federal regulation of cable television is desirable. Even if a local authority can effectively negotiate, the authority may place economic benefit ahead of the public interest to access.

It has been suggested that the first amendment seeks "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance a monopolization of that market."¹⁴⁷ With this purpose, it may not be desirable to leave the availability of access to the media in the hands of the owners of the media. Although state and local governments now have the power to demand public access channels, they have shown little interest in promoting access.¹⁴⁸ To ensure adequate public access to the media, national standards and policies for the regulation of cable television are needed to guide state and local governments and to keep pace with developments in technology.¹⁴⁹

The Constitution and a Right of Access

The demise of the federal access rules has caused a relaxation of the requirement that CATV provide outlets for community expression. If a constitutional right of access to the media exists to promote the goal of free speech, CATV is the forum in which this goal can best be achieved. This is because cable is new and developing, it has an abun-

obtain all of the benefits of cable, including access. *Id.* at 41. There were 35 municipal cable systems in operation as of May 1981. *N.Y. Times*, May 29, 1981, § A, at 14, col. 1. Another alternative to the commercial operations is to form cable cooperatives with community members buying a share. The first such publicly controlled cable system is being initiated in St. Paul, Minnesota. *Id.*

146. Prominent citizens may be employed as lobbyists. *Newsweek*, Aug. 4, 1980, at 44-45; *Access*, June 1, 1981, at 4. In addition, there have been charges that cable operators have bribed local officials. *Id.*

147. *Red Lion Broadcasting v. FCC*, 395 U.S. at 389; *see also* *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

148. Botein & Rice, *Midwest Video: New Directions for Cable?*, *Access*, Apr. 23, 1979, at 1.

149. The National League of Cities has recently developed a model "code of good conduct" for cable television franchising. The code stresses citizen involvement, lobbying restrictions, and financial disclosure by cable companies, city officials, and consultants. Prepared without consultation with the cable industry, the code might lead to the wresting of more public interest concessions, such as access channels, from cable operators, and might increase the interest and awareness of city officials in the potential of cable. *House Study*, *supra* note 18, at 106.

dance of available channels, access presents no major technological or financial problems, and excessive regulation is not necessary to meet a mandatory access requirement. The question remains whether the first amendment forbids the enforcement of unlimited public access requirements because enforcement would infringe on the freedom of the press of the cable operators, or whether there is a public right to exercise freedom of speech on cable television.

Possible Constitutional Impediments to the Right of Access

Although it recognized that the question was not frivolous, the Supreme Court did not discuss the first amendment aspects of the access rules in *Midwest II*.¹⁵⁰ The court of appeals, although also deciding the case on statutory grounds, discussed at some length the constitutional issue involved and concluded in dicta that the access rules violated the first amendment rights of cable operators by wresting control of privately owned communication facilities from them.¹⁵¹

The premise that the government could not interfere with the operation of cable because cable systems are privately owned led to an inadequate first amendment analysis by the Eighth Circuit. The Eighth Circuit stated that the main issue was "the risk of an enlargement of Government control over the content of [cablecast] discussion of public issues."¹⁵² This conclusion is spurious, however, because the cable access rules were content-free. They merely required that channels be left open and did not prescribe who could talk and what could be said.¹⁵³

The Eighth Circuit opinion failed to analyze adequately the distinction between broadcasting, cable, and newspapers as communications media. This distinction is important with respect to the amount of editorial control that the first amendment permits the owner to retain.¹⁵⁴

The contrast between broadcasting and cable in physical and economic terms is so great that in many ways cable is more like newsprint in the context of access requirements. The principal similarity is that

150. 440 U.S. at 709 n.19.

151. 571 F.2d at 1053-59. In its brief to the Court, the FCC failed to make any effort to show that the access rules did not violate the first amendment rights of cable operators, but instead merely restated its program diversity objective and resorted to the language of previous cases.

152. *Id.* at 1054 (emphasis added).

153. There is no content focus except the aforementioned advertising and lottery prohibition, which attempts to keep the access channels noncommercial. The obscenity prohibition was abandoned long before this case. See note 47 *supra*.

154. "[D]ifferences in the characteristics of the news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 386; see also *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

both cable and newsprint have a theoretical abundance of space for diverse viewpoints. The Eighth Circuit in *Midwest II* concluded that, under the first amendment, there is no distinction between newsprint and cable.¹⁵⁵ Thus, because in *Miami Herald Publishing Co. v. Tornillo*¹⁵⁶ the Supreme Court had held that there was no constitutional right of access to newspapers, the Eighth Circuit concluded that there was no such right for cable either.

In *Miami Herald*, the Supreme Court held that a Florida statute establishing a right to reply to newspaper editorial attacks upon political candidates violated the first amendment right of editorial autonomy for newspapers. Although sympathetic to access rights,¹⁵⁷ the Court held that freedom of the press was paramount, that the press was autonomous, and that it therefore could not be regulated.¹⁵⁸ The only reasons given for the decision were the chilling effect enforced access would have,¹⁵⁹ and a first amendment prohibition of regulation of editorial decisions.¹⁶⁰ *Miami Herald* thus left newspapers free of access obligations, while leaving intact the guarantee of limited access to radio and television.¹⁶¹

An analysis of cable, however, shows that it differs from the newsprint media in many ways that enable public access to be enforced without infringing on constitutional rights. First, newspapers usually have an editorial policy that is an important influence upon content and that receives the most first amendment attention.¹⁶² In contrast, a cable television station usually has no editorial policy, but broadcasts merely to entertain. Sports, recently released movies, and, where reception is poor, popular network programs, are its major offerings. Any self-generated political commentary or news programming, other than automated ticker tapes or national news network programs, is in-

155. 571 F.2d at 1056.

156. 418 U.S. 241 (1974).

157. *Id.* at 247-54.

158. *Id.* at 256. As one commentator noted, "[T]he opinion offers virtually no reason for its result [apart from constitutional platitudes] and does not even mention the five-year old *Red Lion* decision," which had upheld access requirements for the electronic media. B. SCHMIDT, JR., FREEDOM OF THE PRESS VS. PUBLIC ACCESS 12 (1976) [hereinafter cited as SCHMIDT].

159. 418 U.S. at 257. "Government enforced right of access inescapably 'dampens the vigor and limits the variety of public debate . . .'" *Id.*

160. *Id.* at 258. Professor Schmidt notes that the decision was handed down at the very end of the 1974 Term and that the Court might have felt rushed, especially because *Nixon v. United States*, 418 U.S. 683 (1974), was about to come before the Court. This might have led the Court to treat "the problem of access in a general and truncated fashion." SCHMIDT, *supra* note 158, at 235.

161. FCC v. Pacifica Foundation, 438 U.S. at 748 (1978).

162. "A newspaper is more than a passive receptacle or conduit for news, comment and advertising," and thus the functions of its editors deserve first amendment protection. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

cidental and unusual.¹⁶³ Furthermore, cable depends on broadcast signals for the major portion of its programming¹⁶⁴ and thus makes no editorial decision about the content of the programs received on these signals; it merely decides which programs to offer.

Second, the source of revenue differs for each type of medium. Newspapers depend largely on advertising as a source of revenue. The more newspapers sold, the more the owner can charge for advertising space. Additionally, advertisers can withdraw their ads if they do not like what is being printed. Cable, on the other hand, derives its revenues primarily from monthly subscription fees. The average cable system derives less than five percent of its revenue from advertising.¹⁶⁵ The concerns of newspaper publishers about advertisers do not apply to cable.¹⁶⁶

Third, television intrudes into homes in a much stronger and more pervasive manner than printed materials. Many recognize television, including cable, as the most powerful medium of speech.¹⁶⁷ The Supreme Court has recognized this influence as a justification for treating broadcasting differently from print under the first amendment.¹⁶⁸ Television provides the opportunity to bring information and ideas to persons without much effort on the part of the viewer. The television medium "may be the preeminent forum for the discussion of ideas and viewpoints in the society."¹⁶⁹ If this is so, messages delivered on cable

163. National news services such as the Cable News Network are transmitted to the local cable operator, usually by satellite, and thus the local operator has no editorial control over them. See note 189 & accompanying text *infra*. One of the purposes of public access is to provide more local news programming—especially to special interest groups whose news and information are deemed too insignificant for the mass appeal required for broadcast television.

164. *Midwest I*, 406 U.S. 649, 675-76 (1972); SLOAN COMMISSION, *supra* note 12, at 51.

165. Media Policy Session, *supra* note 11, at 25.

166. In the past few years, national cable programs, transmitted by satellite, have developed. Some of these are supported by advertising. In addition, the advertising revenues of many cable operators may rise in the future. If this occurs, the source-of-revenue difference between cable and newspapers will be lessened. The advertising, however, would not be on public access channels, but on channels transmitting national programs. National advertisers are unlikely to be concerned with the content of local public access channels. See Media Policy Session, *supra* note 11, at 25-26.

167. M. McLuhan, UNDERSTANDING MEDIA 308-37 (1964); Bazelon, *FCC Regulation of the Telecommunication Press*, 1975 DUKE L.J. 213, 220-21 (1975); Bollinger, *Freedom of the Press and Public Access*, 75 MICH. L. REV. 1, 13-14 (1976). "Not only does virtually everyone have access to a television set, but more people watch it, even for purposes of obtaining news, and for longer periods, than read the publications of the print media." *Id.* at 13 (citing E. EPSTEIN, *NEWS FROM NOWHERE* 9 (1973)).

168. *FCC v. Pacifica Foundation*, 438 U.S. at 748.

169. Bollinger, *Freedom of the Press and Public Access*, 75 MICH. L. REV. 1, 14 (1976). Bollinger and others doubt that television shapes attitudes and ideas in much stronger ways than newspapers. See, e.g., *id.* at 15; Jaffe, *The Editorial Responsibility of the Broadcaster*, 85 HARV. L. REV. 768, 769-70 (1972). This view presupposes that television and print media

television may have more effect than messages delivered in the print medium.¹⁷⁰ As the impact of cable television becomes more pervasive, it may be argued that the views expressed over cable should be more diverse.¹⁷¹

Finally, unlike newsprint, cable systems must obtain government cooperation to obtain a franchise because they operate within the public domain.¹⁷² Cable operators require authorization to use the public streets to lay their cables or to string them along telephone lines. This authorization, or franchise, is usually exclusive and protects the cable operator from potential competition, a privileged position not granted to newspapers.¹⁷³ This dependence on public authorities is in sharp contrast to the almost complete independence of regulation enjoyed by the print media. Thus, because it enjoys a unique position in the community as a result of local government approval, the government does not violate the first amendment by imposing access obligations on the operator.¹⁷⁴

The qualitative differences between cable and newspapers require that a different first amendment standard should apply to them.¹⁷⁵ The *Miami Herald* prohibition against mandatory access should not be transferred automatically from newspapers to cable.

Taking Under the Fifth Amendment

Midwest argued, and the Eighth Circuit agreed, that the access rules constituted a taking of private property without just compensation in violation of the due process clause of the fifth amendment.¹⁷⁶ Concerned that cable operators would be forced to build facilities and to dedicate them to the public,¹⁷⁷ the Eighth Circuit stated that the right to own property "is a most fundamental right, the alleged deprivation

reach the public in relatively equal force. Yet there may be a large segment of the population that is unfamiliar or uncomfortable with the print media or even illiterate and that therefore relies on television, broadcast or cable, as the primary means of receiving information. See SLOAN COMMISSION, *supra* note 12, at 4.

170. See Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 220.

171. The first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

172. Note, *FCC Regulation of Cable Television*, 54 N.Y.U. L. REV. 204, 232 (1979).

173. Note, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 972 (1972).

174. See notes 196-201 & accompanying text *infra*.

175. See Note, *FCC Regulation of Cable Television*, 54 N.Y.U. L. REV. 204, 231 (1979).

176. 571 F.2d at 1057-58. "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend V.

177. 571 F.2d at 1058.

of which cannot be ignored because that right was found unfringed, or overtaken by the public interest"¹⁷⁸

The taking argument, however, is not a sufficient justification for striking down the access rules. The question whether a public regulation interfering with private property calls for compensation principally depends on the magnitude of the taking.¹⁷⁹ The Supreme Court recently held in *Penn Central Transportation Co. v. New York City*¹⁸⁰ that New York could restrict the use of privately owned historical buildings, pursuant to its Landmarks Preservation Law, without effecting a taking, although the law caused the owner to suffer a loss of income. Among the bases for the Court's decision that the law did not constitute a taking requiring just compensation were: (1) the interference with ownership rights was a "public program adjusting the benefits and burdens of economic life to promote the common good . . . and the general welfare";¹⁸¹ (2) the owner was not denied all use of airspace above its building;¹⁸² and (3) the law did not prevent the owner from making a profit and obtaining a reasonable return on its investment.¹⁸³

Under this analysis, the access rules should not be held to constitute a taking. The rules were enacted to promote the public good and the general welfare by furthering first amendment values. On balance, the minimal economic burden on the cable operator is justified. The economic burden can also be justified as part of the benefit of using the public streets for its cables and for the privilege of securing a government-granted monopoly.¹⁸⁴ In addition, the cable operator would still have the use of most of its channels for commercial purposes if access were required.¹⁸⁵

In light of this reasoning, the fifth amendment taking argument

178. *Id.*

179. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 415-16 (1922).

180. 438 U.S. 104 (1978).

181. *Id.* at 123, 138.

182. *Id.* at 136-37.

183. *Id.* at 136.

184. See Note, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 977 (1973). See notes 125-26 & accompanying text *supra*.

185. The rules required a maximum of four out of 20 channels for public access, allowed combining access on one channel until there was a full time demand for more channels, and, in the case of systems in operation before the promulgation of the rules, allowed combining access programming with operator-designated programming on the same channel if demand were low and activated channel capacity were insufficient. 47 C.F.R. § 76.254(a), (b), (c) (1980).

Moreover, the compliance deadline for attaining 20-channel capacity is not until 1986. By that time, most operators probably will have reached that capacity on their own by replacing old equipment and meeting the demand for new programming. Nearly all new systems have a capacity of at least 20 channels. Media Policy Session, *supra* note 11, at 18. Unlimited numbers are predicted for the future. Note, *The Invalidity of Mandatory Cable Access Regulations: FCC v. Midwest Video Corp.*, 7 PEPPERDINE L. REV. 469, 486 (1980).

should not be persuasive in deciding the constitutionality of the access rules. The Eighth Circuit's constitutional opposition to the access rules is based on an insufficient analysis of the first and fifth amendment rights involved in the issue.

Regulation of Content

Another potential constitutional hurdle to the enactment of regulations that mandate access to cable facilities is that the access rules might be said to control impermissibly the content of communication. "[T]he government must remain neutral in the marketplace of ideas."¹⁸⁶ The Supreme Court has consistently held that the government cannot restrict speech because of its message, subject matter, or content.¹⁸⁷

This argument is unpersuasive, however, because the cable access rules struck down in *Midwest II* are content-free. The rules merely require that the cable operator make air time available, and allow the operator "no control over the content of access cablecast programs."¹⁸⁸ In addition, on the channels not used for access, the cable operator retains complete autonomy over content. Thus, the access rules presented no unconstitutional regulation of the content of speech.

On balance, the burden on the operators is not heavy enough to outweigh the importance to the public of having access to a medium of free expression. In addition, neither the minimal infringement on editorial discretion nor the slight economic burden imposed by the access regulations¹⁸⁹ on the operator should justify a refusal of access to a small percentage of the available channels. As the operator retains control over most of its channels, the freedom of press is not impaired. Even if a right to access is granted, the cable operator has the opportunity to exercise its editorial discretion with respect to the large majority of its channels.

Regulation of Cable as a Conduit for Other Speakers

Another potential argument that requiring access on cable television is unconstitutional, implicit in the foregoing arguments, is that freedom of speech prohibits the forced expression of a "public" viewpoint inconsistent with that of the cable operator. The freedom of ex-

186. *FCC v. Pacifica Foundation*, 438 U.S. at 745-46; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 256-58; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 396; *see also* *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 110 (citing 47 U.S.C. § 326 (1976) (prohibiting radio censorship)). See note 72 *supra*. For a further discussion of § 326 and the content-free aspect of cable, see text accompanying notes 85-87 *supra*.

187. *Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972).

188. 47 C.F.R. § 76.256(b). See text accompanying notes 85-87 *supra*.

189. See text accompanying notes 100-17 *supra*.

pression embodied in the first amendment guarantees the right of unrestricted communication between entities and individuals except in certain circumstances.¹⁹⁰ Only exceptionally may the government restrain or mandate the publication of particular information.¹⁹¹

An entity that acts as a conduit, rather than as a creator or an editor of speech, however, may not be acting in ways that the first amendment protects.¹⁹² As a conduit merely enables others to speak, some regulation of speech conduits may be permissible under the first amendment.¹⁹³ Cable television systems act more as conduits than do other communications media.¹⁹⁴ On most channels, the system merely transmits unedited programs that it receives.¹⁹⁵ The nature of a cable system does not require that the owner be given absolute control over all the programming it presents. Thus, as greater regulation of conduits may be allowed than is permissible to originators of speech, and as cable television acts as a conduit, the FCC should be allowed greater latitude in regulating the operation of cable television.

Another argument for allowing the government wide latitude in regulating cable is that a cable system is able to operate only by a license of the local government. As municipalities are not sovereign, but are merely subdivisions of the state,¹⁹⁶ the granting of a franchise is actually state action.¹⁹⁷ In granting such a franchise, the state decides who will be allowed to program, and thus who will be heard.¹⁹⁸ Conversely, the state thereby also decides whose speech will not be heard. As the first amendment prohibits any such state abridgement of free speech,¹⁹⁹ the franchisee, operating under state authority, cannot complain that its first amendment rights are violated when the federal government, represented by the FCC, requires it to share some programming space. The Supreme Court has upheld the right of the FCC to act in this area.²⁰⁰ Federally required access channels that

190. See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979) (false and misleading commercial speech); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (time, place and manner restrictions); *Gertz v. Robert Welch*, 418 U.S. 323 (1974) (libelous words); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

191. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *New York Times v. United States*, 403 U.S. 713 (1971).

192. Kreiss, *supra* note 98, at 1024-25.

193. *Id.*

194. *Id.* at 1026.

195. See note 201 & accompanying text *infra*.

196. See *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1977).

197. Cable franchises can also extend beyond municipal boundaries, thus necessitating state authorization. See W. BAER & M. BOTEIN, *CABLE TELEVISION: FRANCHISING CONSIDERATIONS* 243 (1974).

198. Kreiss, *supra* note 98, at 1012-13.

199. See, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 513 (1975).

200. *Midwest I*, 406 U.S. 649 (1972); *United States v. Southwest Cable Co.*, 392 U.S. 157 (1968).

equalize the benefit of a state or local government decision about who will speak on cable television thus are not prohibited by the first amendment.²⁰¹

Imposing mandatory public access obligations on cable operators in the limited form designed by the FCC does not violate the first or fifth amendments. The access rules should have been held constitutional because they do not exercise control over content, but simply regulate a conduit for originators of speech. In addition, it is evident that the access rules would not have served impermissibly to mandate the publication or adoption of unwanted views by the cable operator. The access requirements do more to promote freedom of speech than to impinge on the freedom of the press.

An Affirmative Right of Access

Scholars have argued that there is a principle embodied in the first amendment that requires that the public have access to the media and that this principle takes precedence over the protective first amendment stance towards the mass media.²⁰² As one commentator has stated:

The most challenging problems in First Amendment theory today lie in the prospect of using law affirmatively to promote more effective functioning of the system of freedom of expression. The traditional premises of the system are essentially laissez-faire in character Thus the issues have turned for the most part upon reconciling freedom of expression with other social interests that the government seeks to safeguard A realistic view of the system of freedom of expression in this country today, however, discloses serious deficiencies that call for a different kind of First Amendment approach.²⁰³

Freedom of expression is essential to ensure individual self-fulfillment, to advance knowledge through open discussion, to provide for decisionmaking by all members of society, and to achieve a more stable society through the peaceful discussion of differing viewpoints.²⁰⁴

One of the most serious problems stifling freedom of expression is that the structure and economics of the modern media allow only a few to enter the communications marketplace.²⁰⁵ The overpowering monopoly and concentration of the mass media over the means of communication have been acknowledged.²⁰⁶ As a result, only a few

201. Kreiss, *supra* note 98, at 1026-30.

202. See, e.g., Barton, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

203. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 627 (1970).

204. *Id.* at 6-7.

205. SCHMIDT, *supra* note 158, at 39-40; see, e.g., Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 238.

206. "[M]ost citizens in the United States experience monopoly newspapers, a small

individuals have access to the media, and there exists the potential for only limited dissemination of ideas and viewpoints. To maintain an informed citizenry, necessary to intelligent participation in a democratic society, the public must have access to all shades of opinion.²⁰⁷

To attain a widespread dissemination of ideas, access must be provided to types of communication that reach a significant number of people. The effective avenues of communication in modern society are newspapers of wide circulation, radio, broadcast television, and cable television²⁰⁸—the media in which the concentration of ownership is the greatest.²⁰⁹ The monopolization of the market is even greater for cable systems than for radio or broadcast television because there is usually only one operator for each service area.²¹⁰ Thus, a cable operator who has the power to control all the programming and information content of the channels on a given system has almost absolute monopoly power over the cable medium of expression in that locale.²¹¹ Furthermore, the concentration of ownership within the cable industry and the increasing overlapping ownership of cable systems and other media amplify the monopolization of the cable industry.²¹²

The owners of the media have the opportunity to influence and manipulate society through their control of access to the means of expression. Yet often they have no special qualifications.²¹³ The only requirement for one who speaks through the media is that he or she have the funds to buy or otherwise to gain access to the media. The Supreme Court, however, has not looked with favor on a system in

number of television stations that are dominated by network programming, and a larger number of radio stations broadcasting largely interchangeable programs with a minimum concern for public affairs." SCHMIDT, *supra* note 158, at 39; see T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 627 (1970); SCHMIDT, *supra* note 158, at 40-46; Lively, *Media Access and a Free Press*, 58 DENVER L.J. 17 n.4 (1980); see also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247-54 (1974).

207. "The theory of free speech is grounded on the belief that people will make the right choice if presented with all points of view on a controversial issue." *Capital Broadcasters v. Mitchell*, 333 F. Supp. 582, 590 (D.D.C. 1971) (Wright, J. dissenting); see J. BARRON, *FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA* 16 (1973) [hereinafter cited as BARRON]; A. MEIKLEJOHN, *POLITICAL FREEDOM* 26-28 (1960).

The Sloan Commission recommended that a limit be set "on the number of cable subscribers served nationally by any single individual or corporate enterprise engaged in ownership of cable franchises." SLOAN COMMISSION, *supra* note 12, at 175, 148-49. This recommendation has never been followed. See note 139 & accompanying text *supra*.

208. Kreiss, *supra* note 98, at 1010 n.60.

209. See note 144 *supra*.

210. CABINET COMM. ON CABLE COMMUNICATIONS REPORT TO THE PRESIDENT 12 (1974).

211. *Id.*

212. See note 144 *supra*; see, e.g., 87 F.C.C.2d 587 (1981).

213. BARRON, *supra* note 207, at 77.

which wealth determines access to the marketplace of ideas.²¹⁴

In light of this inequitable access to the media, commentators have suggested an affirmative interpretation of the first amendment that guarantees access to the dominant media.²¹⁵ Requiring access rights, whereby the operators of the media would be required to share access with those who cannot obtain a chance to speak, would offer the public the capacity for effective communication to a potentially large audience.²¹⁶ As some observers note, owners of the mass media must realize that they do not always depict American society accurately and that only opposing groups and constituencies can represent the diverse viewpoints in the country.²¹⁷

Proponents of access requirements suggest that media operators will not provide access voluntarily because their purpose is to make a profit and not to give access to free speech.²¹⁸ However, "the First Amendment acts as a sword as well as a shield," and . . . it imposes obligations on the owners of the press in addition to protecting the press from government regulation."²¹⁹

Most writers who oppose affirmative access rights accept the notion that the first amendment favors diversity of expression. They argue, however, that access obligations imposed by the government will chill the free speech rights of cable operators or will expand official supervision of expression and that either of these effects will serve eventually to restrict diversity of expression.²²⁰ Thus, these writers argue that autonomy of the press is a basic element of free expression.

The optimal solution to this controversy lies in reconciling the values of autonomy and diversity. This solution would entail determining which medium "should be protected from access so that the values of autonomy can best be preserved . . . and which other [media] should

214. See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 123.

215. See note 144 *supra*; see also BARRON, *supra* note 207, at 71, 74.

216. "Equality through access would attempt to offset capital investment, skill at communication or distribution, perceptivity, popular acceptance, organizational skills, continuing commitment, hereditary privilege, hard work, charisma, luck and all other economic, social, and experience-based factors that traditionally determine who has the capability for effective communication in our society." SCHMIDT, *supra* note 158, at 18-19.

217. BARRON, *supra* note 207, at 93.

218. See *id.* at 5.

219. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 251 (Burger, C.J.) (quoting *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). *Associated Press* and *New York Times* have been offered to support the affirmative access view. Chief Justice Burger also quoted Justice Black's statement in *Associated Press* that "[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ." *Associated Press v. United States*, 326 U.S. at 20, quoted in *Miami Herald*, 418 U.S. at 251-52.

220. SCHMIDT, *supra* note 158, at 31 (citing Lange, *The Role of Access Doctrine in the Regulation of the Mass Media* 52 N.C.L. REV. 1 (1973)).

be made accessible to serve the goal of diversity."²²¹ Cable may be the most effective and practical means of airing public viewpoints.²²² The print and broadcasting media are less suitable to access. The previous analyses of the differences between cable and traditional broadcasting, with its one-channel capacity, and between cable and newspapers has illustrated why autonomy, or at most a limited access, is preferable to the traditional newsprint and broadcasting media.²²³

The Supreme Court has stated that the application of first amendment standards to regulation must be assessed in light of the different characteristics of the medium involved.²²⁴ Radio and television broadcasters, having the capacity to broadcast only one program at a time, must be distinguished from cable operators and newspapers having a much greater capacity to provide access. The scarcity of available broadcast time on a single-channel station makes it undesirable to impose substantial access rights on traditional broadcasters. Moreover, the editorial policy, the sources of revenue, and the absence of intrusion upon the public domain make required access to newspapers undesirable.²²⁵ Thus, as cable television provides the relatively more practical and more effective means of broadcasting diverse public viewpoints, FCC regulations mandating reasonable public access should be upheld.

An additional reason for allowing the imposition of access rights on cable television is that the Supreme Court has refused to allow even broadcasters to monopolize their frequencies because, under the first amendment, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."²²⁶ Thus, a broadcast licensee must provide limited time to others because the scarcity of frequencies means that only a few have the chance to speak over the airwaves.²²⁷ The Supreme Court in *Red Lion* concluded that the FCC could obligate broadcasters to act as fiduciaries and present voices and opinions representative of different viewpoints within the community that would otherwise never be heard.²²⁸ This limited right of access, known as the Fairness Doctrine,²²⁹ requires broadcasters to set aside

221. *Id.* at 36.

222. See text accompanying note 150 *supra*.

223. See notes 76-86, 155-75 & accompanying text *supra*.

224. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 371, 386-87; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

225. See text accompanying notes 162-75 *supra*.

226. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390.

227. *Id.* at 389-90.

228. *Id.* Some commentators advocate abandoning spectrum scarcity as a rationale for government regulation of broadcasting; see, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 699-700 (1978); Bollinger, *Freedom of the Press and Public Access*, 75 MICH. L. REV. 1, 13-14 (1976).

229. 47 U.S.C. § 315 (1976); see 13 F.C.C. 1246 (1949). For a further policy statement on the Fairness Doctrine, see *In the Matter of the Handling of Public Issues Under the*

reasonable amounts of time for discussion of important public issues and for presenting opportunities to air contrasting points of view.²³⁰ It also requires the broadcasters provide time for replies to personal attacks and political editorials that they broadcast.²³¹ Broadcasters, however, retain complete editorial discretion over the issues, presentations, and spokespersons. Thus, the broadcast station retains most of its editorial autonomy.²³² The Supreme Court, however, refused to expand access to the broadcast media when in *CBS* it refused to compel broadcasters to sell editorial advertising time to the highest bidder.²³³

Conventional broadcasting is not the best medium for unlimited access to public viewpoints. The need to appeal to a mass audience for advertising revenues, and the possibility that broadcasters might be drawn away from all controversial discussion because the Fairness Doctrine would obligate them to present all viewpoints and thus consume more valuable time, are sufficient rationales for giving traditional broadcasters the autonomy to refuse to air the discussion of controversial issues.

Thus, public access to an effective mass communications medium is best accomplished on cable television, on which the burdens of achieving diversity of expression encumber media owners the least.

Proposed Regulation

There should be some requirement that all cable television systems provide space for public access. As the Supreme Court has stated that the FCC cannot impose such a requirement, legislation by Congress would be the remaining vehicle for achieving this goal.²³⁴

An optimal public access law would allow more flexibility than did the invalidated FCC regulations.²³⁵ An access regulation should require a minimum amount of access, but, unlike the FCC rules, allow

Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974).

230. 48 F.C.C.2d 1, 7 (1974).

231. These are the rules that were upheld in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 396.

232. A discussion of the many criticisms of the Fairness Doctrine is beyond the scope of this Comment. See, e.g., GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING* (1973); SCHMIDT, *supra* note 158, at 157-82.

233. 412 U.S. 94 (1973). See note 68 *supra*. Some commentators argue that the *CBS* decision is based on the fact that the Fairness Doctrine already provided sufficient access to broadcasting. Kreiss, *supra* note 98, at 1039 n.151. If the current attacks on the Fairness Doctrine result in its repeal, access to cable will be more important than ever. See *Broadcasting*, Sept. 21, 1981, at 23.

234. Both the Senate Communications Subcommittee and the House Telecommunications Subcommittee are considering cable television issues during the 97th Congress, although legislation promoting access seems unlikely. See note 121 *supra*.

235. See notes 42-48 & accompanying text *supra*.

the exact structure of the access, including time and channel allotment, to be determined by the individual cable system franchise agreement. This framework would allow a local government to determine the needs of its community and would allow local authorities to negotiate a franchise agreement that can best meet those needs. By mandating a minimum standard, however, FCC regulation would require that access could not be ignored by local officials or cable operators. At the same time, any burden on cable operators would be minimized, because they would not have to adhere to national standards requiring that a certain number of channels be left open for public access in areas in which that requirement exceeds the need to provide access channels. The rights of access seekers also would not be restricted in areas in which the demand for access exceeds a minimum national standard.

Conclusion

During the 1960's and early 1970's, the Supreme Court seemed to accept the need to provide access to the mass media. With the *CBS*, *Miami Herald*, and *Midwest II* decisions, however, the Court indicated that it was not going to provide a broad right of access to cable television, at least under current legislation. The Communications Act of 1934 should be amended to provide a right of access to cable. Any future legislation should require that a minimum of cable's unlimited channel capacity be left open for public access. The profound social and political influence of television and cable television calls for a scheme of regulation that balances the first amendment rights of freedom of press and freedom of speech. By providing rights of public access to cable television, legislation and regulation can help to meet the goals of the first amendment by ensuring that a diversity of views can be heard and that a full range of ideas can be explored.

Reasonable access requirements should not be held to violate the freedom of the press. Cable operators would still be free to voice whatever views they hold if access requirements are passed. The access requirements would not regulate the content of programs to be aired. Furthermore, the government should be allowed a greater degree of latitude in regulating cable both because it acts principally as a conduit for communication and because the cable system can operate only through a government license.

Leaving public access rights to be determined by a struggle between the local franchising entity and the corporate cable operator inadequately serves the public interest. Frequently, the local government entity is either unprepared to negotiate with a cable operator for access rights or is ignorant of those rights. In addition, a local governmental authority may be too willing to forsake rights to public access in exchange for a lucrative contract. Although the cable industry should not

be stifled through burdensome regulation, legislation designed to ensure minimum rights of public access to cable should be enacted to promote the goals of the first amendment.

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